IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. JOHN M. BANKS

Direct Appeal from the Circuit Court for Montgomery County
No. 40600738 Michael R. Jones, II, Judge

No. M2008-00044-CCA-R3-CD - Filed August 11, 2009

Following a jury trial, Defendant, John M. Banks, was convicted of possession of twenty-six grams or more of cocaine with the intent to sell, a Class B felony. The trial court sentenced Defendant as a Range I, standard offender, to ten years. On appeal, Defendant argues that (1) the evidence was insufficient to support his conviction; (2) the trial court erred in not granting Defendant's motion for a mistrial; (3) the trial court erred in allowing the testimony of a witness not appearing on the State's witness list; (4) the trial court erred in admitting testimony concerning the cocaine recovered from Defendant's vehicle into evidence as an exhibit at trial; and (5) the trial court erred in denying Defendant's motion to exclude evidence. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

J. Runyon, Clarksville, Tennessee, for the appellant John M. Banks.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Chris Clark, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

Officer William Nally, with the Clarksville Police Department, testified that at the time of the offense he was assigned to the District II Criminal Investigations Division. On March 21, 2006, Officer Nally was conducting a surveillance of a Nissan Maxima parked near the Haynes Pool Hall on Franklin Street. As Officer Nally observed the Nissan with binoculars, an African-American male, wearing blue jeans, a black tee shirt, a white or tan-colored thin jacket, and a white baseball

cap approached the vehicle and unlocked the driver's side door. Officer Nally could not see the detail's of the man's face from that distance. The officer in the patrol car next to Officer Nally's vehicle tapped his brake lights. As soon as the man saw the illuminated brake lights on the patrol car, he slammed the car door shut and ran toward the front door of the pool hall. Officer Nally said that the pool hall's front door was locked when he first attempted to enter the building. After finally gaining entry, Officer Nally saw an African-American man wearing a white baseball cap, blue jeans and a black tee shirt, walking from the rear of the building toward the front door. Officer Nally approached the man whom he identified at trial as Defendant. Officer Nally asked Defendant if he had the key to the Nissan Maxima, and Defendant responded, "No." Defendant denied that he owned one of the tan-colored jackets hanging in the back of the pool hall. Officer Nally said that Defendant appeared nervous.

Officer Nally then spoke with another African-American man dressed in blue jeans and a black tee shirt who was sitting on a bar stool. Officer Nally said that the man identified himself as Charles Sims. Mr. Sims told Officer Nally that he did not know anything about the Nissan Maxima. Officer Nally said that when Mr. Sims stood up to talk to him, Officer Nally noted that Mr. Sims was thinner and taller than the man he had seen unlock the Nissan. Officer Nally said that Defendant left the pool hall while Officer Nally was talking to Mr. Sims. Officer Nally said that he did not talk with Defendant again that night, and he did not at that point know Defendant's address or telephone number.

On cross-examination, Officer Nally acknowledged that he did not see Defendant enter the pool hall. Officer Nally stated that he did not search for the driver of the Nissan in any place other than the pool hall. Officer Nally acknowledged that he identified Defendant as the driver of the Nissan based on his clothing. Officer Nally said that he was not aware that Mr. Sims had a history of using drugs. Officer Nally stated that he briefly searched for the Nissan's car keys inside the pool hall and in the pool hall's parking lot but was unsuccessful.

On redirect examination, Officer Nally said that Robert Vance, the owner of the pool hall, initially consented to a search of the premises but limited the search to certain areas and eventually withdrew his consent.

Officer Michael Ulrey, with the Clarksville Police Department, testified that he participated in the surveillance of the Nissan Maxima parked near Haynes Pool Hall on March 21, 2006. Officer Ulrey parked his patrol car so that he could observe the Nissan in his rear view mirror. Officer Ulrey observed an African-American man approach the Nissan. Officer Ulrey stated that the individual ran back to the pool hall when Officer Ulrey hit his brake lights as he shifted his patrol car into drive. Officer Ulrey said that he was unable to distinguish any of the man's facial features.

Michael Sisco, an employee of a towing company, testified that he towed the Nissan Maxima on March 21, 2006, at the request of the Clarksville Police Department, from Franklin Street to his place of business. Mr. Sisco said that the company's lot was fenced and locked. Mr. Sisco stated that he towed the Nissan to the police department the next day.

Detective Gary Hodges, with the Clarksville Police Department, conducted a search of the Nissan Maxima at the towing company's facility on March 22, 2006. Detective Hodges testified that he discovered two "cookies" of crack cocaine in the vehicle's front center console. Detective Hodges said that a "cookie" is a large amount of crack cocaine from which smaller pieces, or "rocks," are cut for resale. Detective Hodges contacted his supervisor after the drug discovery, and Agent Kelly Darling was dispatched to the scene. The Nissan Maxima was then towed to the police department where a further search was conducted. Detective Hodges observed Agent Darling remove a set of digital scales and a set of keys from the console. A YMCA membership card with Defendant's name and photograph on the card was attached to the key ring. A receipt for service work performed on the Nissan with Defendant's name and address printed in the upper left-hand corner was found in the vehicle's glove box.

On cross-examination, Detective Hodges acknowledged that several latent fingerprints were lifted from the vehicle. Detective Hodges said that the fingerprints were not submitted for identification because Detective Hodges did not believe that the prints had sufficient details to support an analysis. Detective Hodges acknowledged that he found an envelope in the vehicle addressed to Ronald Johnson in Clarksville, Tennessee, from Derby and Lisa Bell in Compton, California, as well as an insurance policy binder issued to Mr. Johnson. Detective Hodges stated that he did not interview Mr. Johnson. Detective Hodges said that there was a great deal of clothing in the vehicle's trunk from Hip Hop Clothing in Englewood, California, with an identification card noting Robert Bell as the owner of the store. Detective Hodges acknowledged that he did not attempt to contact Mr. Bell. Detective Hodges stated that he was personally aware that Charles Sims had been convicted several times on drug charges.

On redirect examination, Detective Hodges said that he had not received any inquiries from Ms. Bell, Mr. Bell, or Mr. Johnson concerning the return of the Nissan.

Agent Oakley W. McKinney, a forensic scientist with the T.B.I., testified that he identified several fingerprints belonging to Defendant on three plastic bottles found in the Nissan. Agent John Scott, Jr., also a forensic scientist in the T.B.I.'s drug section, testified that he performed an analysis on the substance found in the Nissan and determined it to be 47.7 grams of cocaine.

Steven Hamilton testified that he is a narcotics investigator with the Clarksville Police Department. Investigator Hamilton stated that he was not involved in the investigation of the Nissan, but he knew Defendant prior to March 21, 2006. Investigator Hamilton said that he had seen Defendant driving a newer model Nissan Maxima or Altima approximately twenty times over a period of six to eight months prior to the vehicle's seizure. Investigator Hamilton said that Defendant's vehicle was similar to the vehicle shown in the photograph introduced as Exhibit 2 at trial. On cross-examination, Investigator Hamilton said that he did not notice whether Defendant's vehicle had an out-of-state license tag.

Kelly Darling testified that he was employed with the major crimes unit of the Clarksville Police Department at the time of the offense. Agent Darling stated that he processed a Nissan

Maxima on March 22, 2006, at the major crimes unit facility. Agent Darling stated that the evidence collected during the search included the cocaine, a set of keys, a receipt for service work performed on the Nissan, a small black notebook containing business cards, a sales receipt, a set of digital scales, and three plastic bottles. Agent Darling said that the items were photographed and then removed from the vehicle. Each item was logged on to an evidence sheet and assigned a case number. The items were placed in an envelope, sealed, initialed by Agent Darling, and then delivered to the evidence processing room.

The State rested its case-in-chief, and Defendant presented his defense. Detective Hodges was recalled as a witness. Detective Hodges identified the location of Haynes Pool Hall from a large aerial map of the surrounding area. Detective Hodges acknowledged that he knew that Mr. Sims had several felony drug convictions. On cross-examination, Detective Hodges stated that if an officer was parked near the warehouse, he would not be able to observe the pool hall's entrance, but, with the aid of binoculars, he or she would be able to identify an individual's clothing, and, with proper lighting, whether the individual was an African-American.

II. Sufficiency of the Evidence

On appeal, Defendant challenges, without argument, references to the record, or citation to authority, the sufficiency of the convicting evidence. See Tenn. R. App. P. 27(a)(7) ("The brief of the appellant shall contain ... [a]n argument ... with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on"); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Nonetheless, upon review, we conclude that the evidence was sufficient to support Defendant's conviction of possession of twenty-six grams or more of cocaine with the intent to sell.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In order to be convicted of possession of twenty-six grams or more of cocaine with the intent to sell or deliver, the State must prove that Defendant "knowingly possess[ed] a controlled substance with the intent to manufacture, deliver or sell the controlled substance." T.C.A. § 39-17-417(a)(4). It is permissible for the jury to "draw an inference of intent to sell or deliver when the amount of the controlled substance and other relevant facts surrounding the arrest are considered together." T.C.A. § 39-17-419; State v. Dowell, 705 S.W.2d 138, 142 (Tenn. Crim. App. 1985); see also State v. Willie Earl Kyles, Jr., No. W2001-01931-CCA-R3-CD, 2002 WL 927604, at *2 (Tenn. Crim. App., at Jackson, May 3, 2002), perm. to appeal denied (Tenn. Oct. 21, 2002) (concluding that jury could infer possession of drugs with intent to sell or deliver from the amount of drugs and circumstances surrounding the defendant's arrest); State v. James R. Huntington, No. 02C01-9407-CR-0 0149, 1995 WL 134589, at *3-4 (Tenn. Crim. App., at Jackson, Mar. 29, 1995), perm. to appeal denied (Tenn. July 10, 1995)(determining that the jury could infer intent to sell marijuana primarily from large quantity of marijuana in the defendant's possession).

Officer Nally testified that he observed an African-American man, later identified as Defendant, approach a Nissan Maxima parked near Haynes Pool Hall and begin to unlock the driver's side door with his key. Defendant's YMCA membership card with his name and photograph and a receipt for service work performed on the Nissan reflecting Defendant's name and address were found inside the Nissan during a subsequent search of the vehicle. The search also revealed two "cookies" of crack cocaine weighing 47.7 grams in the vehicle's front console and a set of digital scales. Defendant's fingerprints were found on three plastic bottles recovered from the vehicle's interior.

Based on our review, we conclude that a rational trier of fact could conclude beyond a reasonable doubt that Defendant was guilty of possession cocaine with the intent to sell. Defendant is not entitled to relief on this issue.

III. Failure to Declare a Mistrial

In the indictment, Defendant was charged in count one with the theft of the Nissan Maxima and in count two for the possession of twenty-six grams or more of cocaine with the intent to sell. The two counts of the indictment were severed for separate trials. Prior to trial, Defendant filed a motion in limine seeking to exclude evidence that the Clarksville Police Department was conducting a surveillance of the Nissan Maxima on March 21, 2006, because of the belief that the vehicle had been stolen. The trial court granted Defendant's motion, finding that evidence pertaining to the alleged theft of the Nissan was not relevant to the offense for which Defendant was being tried.

Defendant argues that the following testimony impermissibly interjected evidence of the theft offense into his trial on the drug offense. Detective Nally acknowledged on direct examination that he did not have any knowledge that there were drugs in the Nissan Maxima. The State asked whether he was conducting a drug investigation on March 21, 2006, and Detective Hodges responded, "No, sir, we were not." The State then pursued the following line of questioning:

[STATE]: Initially, tell us how the search began.

[DETECTIVE HODGES]: Initially, I was going to identify this vehicle for a pending investigation that was on-going.

[STATE]: That was a really bad question that I asked you and I am going – did you have a key to get into this vehicle or did you have to get into the vehicle by other means?

[DETECTIVE HODGES]: No, I did not. I attempted to have a key made off the identification numbers, but the key did not work. I had a locksmith come out and he slides a baggie into the – inside the door, just far enough open to get a tool in there, and he popped the button and opened the door and he left.

Later, Detective Hodges explained that his search of the vehicle was "entirely different from the drugs." Detective Hodges acknowledged on redirect examination that his investigation did not involve the drug offense, and that the drug investigation was handled by Agent Darling. Defendant did not contemporaneously object to any of the above described testimony.

On cross-examination, Defendant questioned Detective Hodges about the extent of his investigation of other potential owners of the Nissan Maxima as follows:

DEFENSE COUNSEL: Likewise, recovered in the vehicle, was a Federal Express envelope with the return address of (inaudible) Derby and Lisa Bell from Compton, California to Ronald Johnson, Clarksville, Tennessee?

DETECTIVE HODGES: That's correct.

DEFENSE COUNSEL: And did you contact Lisa Bell in Compton, California?

DETECTIVE HODGES: I was in contact with F.B.I., Orange County, Auto Theft Task Force –

DEFENSE COUNSEL: Did you contact Lisa Bell?

DETECTIVE HODGES: I did not contact Lisa Bell personally.

DEFENSE COUNSEL: Did you contact Ronald Johnson?

DETECTIVE HODGES: Not personally.

At this point, defense counsel requested a conference out of the hearing of the jury during which the trial court cautioned Detective Hodges to answer only the question asked. Defendant did not request a curative instruction and resumed Detective Hodges' cross-examination at the conclusion of the conference.

Before the commencement of trial on the following morning, Defendant moved for a mistrial based on the accumulated testimony of the State's witnesses which referred to a separate investigation regarding the Nissan Maxima. The trial court denied the motion stating that:

> I do not believe that it is necessary to grant a mistrial in this case. On those matters where it is obvious from questions of both sides that there was surveillance of this vehicle and that for whatever reason for that surveillance, it had nothing to do with the finding of the drugs. So that – I don't believe any reference to the keys has anything to do with a theft investigation that wasn't even started at that point. So, I do not believe that any curative instruction is necessary on that. There was a reference to a theft division in California; however, there was no reference at all, to my memory, that this car was the subject of that telephone call, so I am not going to attempt to select portions of this to tell the jury to disregard, so I am not going to give a curative instruction at this point in time.

Defendant argues that the trial court erred in denying his motion for a mistrial. Initially, we observe that Defendant has waived this issue by offering no argument or citation to authority in his brief to support his assertion. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). As to the testimony presented during the direct examination of the State's witnesses, we note that a defendant's failure to object to testimony which he or she deems objectionable or to move for a mistrial at the time the witness makes the statements serves as grounds for waiver of the issue. See Tenn. R. App. P. 36(a) (providing that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"); State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995); State v. Smith, 893 S.W.2d 908, 922 (Tenn. 1994).

As to the testimony elicited from Detective Hodges on cross-examination, Defendant objected to his response about contacting California, and the trial court cautioned Detective Hodges not to offer testimony concerning the theft investigation. After this caution, Defendant resumed his cross-examination, and did not contemporaneously request a mistrial. See State v. Robinson, 971 S.W.2d 30, 42 (Tenn. Crim. App. 1997) (concluding that failure to contemporaneously object, request curative instruction or move for mistrial is typically grounds for waiver of an issue on appeal, absent plain error).

Waiver issues aside, however, we conclude that the trial court did not abuse its discretion in denying Defendant's request for a mistrial. A mistrial should be declared in criminal cases only in

the event that a manifest necessity requires such action. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). In other words, a mistrial is an appropriate remedy when a trial court cannot continue without causing a miscarriage of justice. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial lies within the sound discretion of the trial court, and that decision will not be overturned on appeal absent a clear abuse of that discretion. State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998) (citing State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990)). The burden of establishing the necessity for a mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

As the trial court observed, although the jury was informed that another investigation was being conducted, no evidence was presented that this investigation involved the possible theft of the Nissan Maxima. Detective Hodges's brief response concerning the Orange County auto theft task force did not implicate the Nissan Maxima as the subject of the call. Based on our review of the record, we conclude that the trial court did not err in denying Defendant's request for a mistrial. Defendant is not entitled to relief on this issue.

IV. Disclosure of State's Witness

Defendant argues that the trial court erred in allowing Investigator Hamilton to testify at trial because his name was not included on a witness list prepared by the State's investigator and provided to Defendant during discovery. Investigator Hamilton's name was also not listed on the indictment.

The district attorney general is to list on the indictment the names of witnesses expected to be called at trial. T.C.A. § 40-17-106 . However, this duty is directory only. State v. Baker, 751 S.W.2d 154, 164 (Tenn. Crim. App.1987); State v. Underwood, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984). Accordingly, failure to include a name on the list does not necessarily disqualify that witness from testifying. State v. Street, 768 S .W.2d 703, 711 (Tenn. Crim. App. 1988). However, the statute is intended to prevent surprise to a defendant and to ensure that the defendant will not be handicapped in defense preparation. State v. Morris, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987). A defendant will be entitled to relief for nondisclosure if he or she can demonstrate prejudice, bad faith, or undue advantage. State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992); State v. Kendricks, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). Specifically with respect to prejudice, "'it is not the prejudice which resulted from the witness' testimony but the prejudice which resulted from the defendant's lack of notice which is relevant.'" Id. The decision to allow a witness to testify is discretionary with the trial court. Id.

At the conclusion of the first day of trial and after the jury left the courtroom, Defendant raised an objection to the State calling Investigator Hamilton as a witness at trial the next day because Investigator Hamilton was not named on the State's witness list. Defendant, however, acknowledged that it was "mentioned in one of the multiple pieces of paperwork . . . that [Investigator] Hamilton says that he had previously seen [Defendant] riding in this vehicle." The trial court found that:

> [b]ased on the information having been provided in the discovery and that name of that person being given to the Defense, the Defense had ample time to interview that witness, should the Defense had desired to do so, so I cannot find that there is any prejudice to the Defense. I am going to allow that witness to be called to testify in the morning.

Defendant acknowledged that he had prior notice of Investigator Hamilton's testimony, and he does not suggest in his brief how he was prejudiced by the exclusion of Investigator Hamilton's name from the State's witness list or what more he could or would have done if the State had provided the defense with Investigator Hamilton's name at an earlier date. Defendant has, therefore, not demonstrated any prejudice or any undue advantage enjoyed by the State. Based on our review, we conclude that the trial court did not abuse its discretion in permitting Investigator Hamilton to testify at trial. Defendant is not entitled to relief on this issue.

V. Chain of Custody

On appeal, Defendant argues that the trial court erred in admitting the cocaine into evidence as an exhibit at trial. Defendant does not challenge the chain of custody proof based on the State's failure to call all of the witnesses who handled the cocaine. Instead, citing State v. Scott, 33 S.W.3d 746, 760 (Tenn. 2000), Defendant contends that in light of this failure, the cocaine was admissible only if its identity and integrity was demonstrated by other means. Defendant argues that the State failed to establish the integrity of the evidence because the property bag in which the cocaine was stored was unsealed at trial before it was identified by the State's witnesses.

The State sought to introduce the property bag containing the cocaine into evidence during Detective Hodges' direct examination because Agent Darling could not testify until the second day. Defendant objected as follows:

> Well, there is no – the chain of custody – [Agent Darling] is the one that – There is no way for [Detective] Hodges to identify it, the bag has been opened – and I don't think that [Detective] Hodges can identify that as being what he found in the car.

The trial court admitted the property bag into evidence as Exhibit 5 for identification purposes only until such time as the chain of custody requirements were met.

At the close of the State's case-in-chief, a hearing was held within the presence but out of the hearing of the jury concerning Defendant's objection to the admissibility of the cocaine, and the following colloquy occurred:

> [DEFENSE COUNSEL]: The individual who sent the [cocaine] to the Lab [Brad Crowe] – when the Lab Technician got here, [Agent] McKinney got here, I think the bag was

opened, the bag had been opened, that's the way the bags were handed to him?

[STATE]: He was very honest, he testified that he opened them at this Counsel table so that I could retrieve items and review –

[DEFENSE COUNSEL]: As far as Brad Crowe – I think the evidence custodian is the one who sent the [cocaine] to the T.B.I., took it to the T.B.I.? When [Agent] McKinney got the bags, they were open.

[STATE]: They were open here. They weren't opened at the T.B.I. He didn't testify to that. He testified that they were open on the stand when he (inaudible) but again, the case law is very clear that unless there is some evidence – and it doesn't have to be a lot, but evidence that there was some tampering or some issue with the chain of evidence. The State does not have to prove every link of the chain. We have hit all the main links. I can get Brad Crowe over here, but I hate to waste everybody's time and go through all that.

At this point, the trial court excused the jury from the courtroom, and the discussion continued out of the jury's presence.

[DEFENSE COUNSEL]: Besides being handled now without gloves – there are markings on the baggies themselves that Oakley McKinney testified about the baggies. My objection was that [Officer] Brad Crowe was the person who sent the evidence to the Lab. He has not been called to testify to the chain of custody – I guess we relaxed it a little bit based on [Agent] Darling who couldn't be here until today and the State was going to shore up the chain of custody with – I presume [Agent] Darling. Officer Crowe has not testified and that is my concern about the chain of custody.

[THE COURT]: At this point Exhibit Number 5 [has] only been marked for identification purposes. It has certainly been identified; however, it was identified as – by Detective Hodges and that is when it was marked and then it was identified by John Scott as the

> toxicologist. So – I am going to allow that into evidence at this point. I believe there has been enough identification from the Detective who saw the car, basically was involved in the seizing of that matter, Detective Hodges, and then identification again as basically being the same item. It is certainly not a complete chain of custody as there has been no showing of what happened to it once it got to the Clarksville City Police evidence room or how it got to the lab. However, based on the identifications as being the same items, the Court is satisfied that the chain of custody is sufficiently set at this point.

We review challenges to the chain of custody of evidence under the abuse of discretion standard. State v. Cannon, 254 S.W.3d 287, 295 (Tenn. 2008) (citing State v. Scott, 33 S.W.3d 746, 752 (Tenn. 2000); State v. Beech, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987)). Under this standard, we will not reverse unless the trial court "'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

As a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody. Scott, 33 S.W.3d at 760. Each person who has control or custody of the evidence "between the time it is collected and the time it is either introduced into evidence or subjected to scientific analysis" is a "link" in the chain of custody. Neil P. Cohen et al., Tennessee Law of Evidence § 9.01[13][c] (5th ed. 2005). The purpose of the chain of custody requirement is to insure "that there has been no tampering, loss, substitution, or mistake with respect to the evidence." Id., (quoting State v. Holbrooks, 983 S.W.2d 697, 700 (Tenn. Crim. App. 1998)).

As our supreme court recently observed:

> [e]ven though each link in the chain of custody should be sufficiently established, this rule does not require that the identity of tangible evidence be proven beyond all possibility of doubt; nor should the State be required to establish facts which exclude every possibility of tampering. Scott, 33 S.W.3d at 760. An item is not necessarily precluded from admission as evidence if the State fails to call all of the witnesses who handled the item. See State v. Johnson, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984). Accordingly, when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence. On the other hand, if the State fails to offer sufficient proof of the chain of custody, the "evidence should not be admitted ... unless both identity and integrity can be demonstrated by other appropriate means."

Scott, 33 S.W.3d at 760 (quoting Cohen et. al., Tennessee Law of Evidence § 901.12, at 624 (3d ed. 1995)).

Cannon, 254 S.W.3d at 295-296.

We observe initially that Agent McKinney did not testify during his direct examination as to how or when the property bag was opened as the State suggested, nor does the State address the unsealing of the property bag in its brief. Nonetheless, we glean from the record that either the prosecutor or a State's witness at the prosecutor's request unsealed the property bag in the courtroom at some point prior to Detective Hodges' testimony.

As noted above, each individual who had control or custody over the evidence from the time that it was collected until it is subjected to scientific analysis is a link in the chain of custody. Neil P. Cohen, et al., Tennessee Law of Evidence, § 9.01[13] [c] (5th ed. 2005). In this instance, the State did not call either Officer Crowe who, according to the standard form used by the T.B.I., delivered the cocaine to the T.B.I., or the T.B.I. technician who received the evidence. However, Mr. Sisco testified that he towed the Nissan Maxima to his company's car lot where it was parked behind a locked fence. Detective Hodges testified that he searched the Nissan Maxima the next day and discovered two "cookies" of crack cocaine in the vehicle's front console, and the vehicle was towed to the police department. Detective Hodges stated that the cocaine in the property bag introduced as Exhibit 5 at trial appeared the same as the cocaine discovered in the Nissan. Agent Darling testified that he photographed the cocaine, logged the cocaine in as evidence, assigned the cocaine a case number, placed the cocaine in an envelope, sealed the envelope, and delivered the envelope to the police department's evidence processing room. Agent Scott testified that he tested the cocaine found in the Nissan Maxima, that the bag was marked with the T.B.I. number assigned to the case, that he resealed the property bag after testing, initialed and noted the date on which the bag was sealed. Agent Scott's toxicology report was introduced as an exhibit at trial without objection.

Defendant points to Agent McKinney's testimony during cross-examination as evidence that the integrity of the cocaine was called into question. Agent McKinney testified on cross-examination that his records indicated that he used powder to test the two baggies which contained the "cookies" for fingerprints. Agent McKinney acknowledged, however, that there did not appear to be any powder residue on the baggies. Defense counsel asked if there was "a mistake of some kind," and Agent McKinney responded, "It might be a mistake there that I noted it and did not use actually powder on them because a plastic bag of this nature[,] very wrinkled[,] is an extremely pour [sic] source for latent prints."

Nonetheless, the State presented evidence at trial concerning the beginning and the end of the chain of custody of the cocaine, and there is no evidence that the property bag or the cocaine itself was tampered with before it was submitted to Agent Scott for scientific analysis. After careful review of the record, we conclude that the trial court did not abuse its discretion in admitting the cocaine into evidence as an exhibit. Defendant is not entitled to relief on this issue.

VI. Motion to Exclude Evidence

Defendant argues that the trial court erred in denying his motion to exclude evidence after the State failed to comply with Rule 12(d)(2) of the Tennessee Rules of Criminal Procedure. Defendant filed a Rule 12(d)(2) motion on August 8, 2006. The trial court entered an order on September 13, 2006, granting the State thirty days to provide the requisite notice of intent to use evidence. On February 12, 2007, Defendant filed a motion to exclude any evidence of which the State had failed to provide notice as ordered by the trial court. The State's response to Defendant's motion is not included in the record. A hearing was apparently held on Defendant's motion in May 2007, but a transcript of the proceeding is not included in the record. The trial court entered an order denying Defendant's motion on December 5, 2007, after finding that the State had responded to Defendant's requests for discovery.

Rule 12(d)(2), Tennessee Rules of Criminal Procedure, requires that upon a defendant's request, the State will provide the defendant notice of its "intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16." Tenn. R. Crim. P. 12(d)(2). The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce. State v. Fredrick Arnaz Miller, No. E2005-01583-CCA-R3-CD, 2006 WL 2633211, at *15 (Tenn. Crim. App., at Knoxville, Sept. 14, 2006), perm. to appeal denied (Tenn. Jan. 29, 2007) (citing State v. Louis Francis Giannini, No. 36, 1991 WL 99536, at *4 (Tenn. Crim. App., at Jackson, June 12, 1991), perm. to appeal filed (Tenn. May 27, 1977) (observing, however, that a defendant is "not entitled to the production of 'all evidence to which the defendant may be entitled discovery pursuant to Rule 16' – only that evidence which could be subject to a motion to suppress")).

Initially, we observe that it is the defendant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues which are the bases of the appeal. See Tenn. R. App. P. 24(b); State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993) (a defendant's failure to provide court with complete record relevant to issues presented constitutes waiver of those issues); State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990) (appellate court is precluded from considering issue when record does not contain transcript of what transpired in trial court with respect to that issue). Accordingly, "[i]n the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence ." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

Moreover, Defendant filed a motion to suppress "any and all evidence seized" following a search of the Nissan Maxima. In his brief, Defendant does not identify what other evidence subject to possible suppression was introduced at trial by the State without notice. Instead, he argues only generally that "[t]here was evidence before the jury, which had said Notice been provided, [Defendant's] attorney would have moved to exclude or suppress such."

When there has been a failure to produce discoverable material within the allotted time, the trial judge has the discretion to fashion an appropriate remedy; whether the defendant has been prejudiced by the failure to disclose is always a significant factor. See State v. Baker, 751 S.W.2d 154, 160 (Tenn. Crim. App. 1987). Generally speaking, the exclusion of the evidence is a drastic remedy and should not be implemented unless there is no other reasonable alternative. See, e.g., State v. House, 743 S.W.2d 141, 147 (Tenn. 1987). Additionally, a defendant must demonstrate actual prejudice from the State's failure to provide evidence pursuant to a discovery request. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981); State v. Briley, 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981).

Based on the foregoing and notwithstanding waiver, we conclude that Defendant has failed to show any prejudice resulting from the trial court's denial of his motion to exclude evidence. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE